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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996:)
)
Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other)
Customer Information)
)
)
)
Implementation of the Non-Accounting)
Safeguards of Sections 271 and 272 of the)
Communications Act of 1934, as Amended)
)

CC Docket No. 96-115

CC Docket No. 96-149

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

VANGUARD CELLULAR SYSTEMS, INC.

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SUMMARY

The Commission has requested comments on, among other things, whether it should establish a customer's right to prohibit carrier use of Customer Proprietary Network Information ("CPNI") for marketing purposes otherwise permitted by Section 222 and the Commission's rules. Vanguard opposes the establishment of this new right for a number of reasons.

First, Congress delicately balanced multiple interests, including competition, customer privacy and convenience, and carriers' need to realize commercial benefit from the use and the good will of their customers. The Commission should not step beyond what Congress enacted. Tilting the balance in favor of customer privacy compromises the other interests in a manner not intended by Congress that is detrimental to carriers, particularly small and medium-sized carriers, and their customers. Indeed, other industries are not subject to similar restraints.

Moreover, if the Commission establishes a new customer right to deny use of CPNI, small and medium-sized carriers would be particularly harmed. This would occur because the costs of compliance would be spread across a smaller customer base and because their marketing efforts would be disproportionately affected.

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COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard") by its attorneys, hereby submits its comments in the above-referenced proceeding.^{1/} As demonstrated below, the Commission should not allow customers to restrict the use of Customer Proprietary Network Information ("CPNI") in a manner not contemplated by Congress.

^{1/} Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-115, 96-149, FCC 98-27 (rel. February 26, 1998) ("*Second Report and Order*").

I. INTRODUCTION

The *Second Report and Order* requested comments on three issues concerning interpretation of the CPNI provisions of Section 222 of the Communications Act (the "Act") as amended by the Telecommunications Act of 1996. Vanguard submits these comments with respect to the first of the three issues — whether the Commission should adopt a rule creating a new right permitting customers to prohibit use of CPNI that otherwise would be permitted under Section 222 and the Commission's existing rules.

Vanguard is a medium-sized, independent cellular carrier, serving less than 650,000 customers in 29 cellular MSAs and RSAs in 10 states. With facilities, including switches, in place, Vanguard could be a competitor to ILECs in their service territories. As a facilities-based provider of wireless telecommunications services, Vanguard opposes the creation of a right for customer's to restrict statutorily permitted uses of CPNI. Vanguard opposes the creation of this right for three reasons: (1) Congress did not intend and the statute does not provide for customers to have this right; (2) creating a right for customers to restrict statutorily permitted uses of CPNI excessively regulates and interferes in the carrier/customer relationship; and (3) *small and medium sized carriers will be disproportionately burdened* if the Commission creates a right for customers to restrict statutorily permitted uses of CPNI.

II. SECTION 222 DOES NOT CONTEMPLATE THE PROPOSED RESTRICTION ON CARRIER USE OF CPNI

The *Second Report and Order* recognized that Section 222, as enacted by Congress, was intended to "protect customer privacy interests, while furthering fair competition"^{2/}

Creating a unique right, not provided for in the statute, that permits customers of communications carriers to prohibit use of CPNI for all marketing purposes skews the balance intended by Congress, hampers fair competition, and is contrary to the language, history and structure of Section 222 of the Act.

The *Second Report and Order* attempted to strike a balance that protected customers' reasonable expectations of privacy and the interests of competitors and also allowed carriers reasonable use of CPNI in marketing "alternative versions" of existing subscribed services and additional or related offerings.^{3/} The Commission acknowledged that this practice would "allow the carrier to suggest more beneficial ways of providing the service to which the customer presently subscribes."^{4/} The Commission also explicitly acknowledged Congress' close scrutiny of CPNI and its focus on striking the proper balance among competing interests. The Commission correctly recognized that, to give meaning to the statutory scheme in Section 222, it *must* interpret Section 222(c)(1)(A), as it does, "to permit some use of CPNI for marketing purposes."^{5/} Indeed, Section 222 "differs in fundamental respects from the Commission's

^{2/} *Second Report and Order* at ¶ 31.

^{3/} *Id.* at ¶ 35.

^{4/} *Id.*

^{5/} *Id.* at ¶¶ 36 and 37.

existing CPNI regime and contains "specific and unique language."^{6/} Section 222 is a catalog of specific rules for when a provider may use CPNI, when it may not and when customer assent is required.^{7/} It is, therefore, apparent that Congress acted deliberately and carefully in setting the parameters for the appropriate use of CPNI.^{8/}

Certainly, in establishing this carefully designed statutory structure that significantly expands on the CPNI regulatory framework implemented by the Commission, Congress also would have established an explicit right for customers to restrict the statutorily permitted uses of CPNI if Congress had intended for customers to have such a right. This is particularly true given the explicit language Congress uses in provisions such as Section 222(c)(2). The Commission should defer to Congress' judgment and adopt a "deregulatory" approach that "remains true to the statute"^{9/} and avoids the creation of unnecessary restrictions that exceed statutory parameters.

III. THE CONTEMPLATED RESTRICTION WOULD BE A UNIQUE INFRINGEMENT ON THE BUSINESS OPERATIONS OF COMMUNICATIONS PROVIDERS

It is ordinary business practice in the context of a customer/service provider relationship for the service provider to use information derived through the service relationship to improve

^{6/} *Id.* at ¶ 34.

^{7/} *See, e.g.,* 47 U.S.C. § 221(b) (prohibiting use of CPNI obtained from other carriers), (c)(1)(A) (describing certain permissible uses).

^{8/} *Id.* at ¶ 36.

^{9/} *See* Statement of William E. Kennard, Chairman, Federal Communications Commission, on Section 271 of the Telecommunications Act of 1996, Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, United States Senate, March 25, 1998.

service offerings and market related services. The use of CPNI by carriers for this purpose is not unique or surprising and does not infringe on a customer's reasonable expectation of privacy. In the telecommunications industry, as in other industries, targeted marketing efforts benefit customers by improving service offerings, permitting customers to take advantage of new service packages, and making customers aware of new service alternatives. A rule requiring communications providers to restrict their internal use of CPNI on customer request would, in fact, place telecommunications providers in a position very different than other industries.

The Commission's regulations should not hamper these marketing practices by permitting consumers to prohibit use of CPNI. The reasons for this are twofold: (1) customers less sophisticated about the ways in which their carriers' use of CPNI can benefit them may unknowingly exclude themselves from these benefits; (2) customers bombarded with telecommunications marketing efforts, in a confused effort to eliminate unwanted marketing (or unwanted use of CPNI by third parties) may unintentionally foreclose themselves from the benefits of targeted marketing by their selected service provider.

Prohibiting the use of CPNI for all marketing purposes would put the carrier in a position with respect to its customer that is indistinguishable from that of its competitors, essentially extinguishing the value of the relationship between the provider and its customer. The information derived by the provider from this relationship creates value for both parties.^{10/} CPNI clearly is valuable commercial information acquired by a carrier in the course of doing business

^{10/} For example, targeted marketing would permit a carrier to adopt review customer CPNI and identify and recommend the most economical service plan for a particular customer or to create new service plans to fit the needs of specific categories of customers.

with its customers. Permitting customers to prohibit all use of CPNI for marketing purposes will "deny all economically beneficial" use of this valuable asset. Indeed, establishing a right for customers to prohibit the use of CPNI will likely result in a constitutionally prohibited taking without just compensation.^{11/}

In addition, it is not apparent that there is any need for mandatory rules of this nature in an increasingly competitive telecommunications marketplace. Other industries with access to similar information are not required to let consumers restrict internal use of information. While some companies may choose to restrict their own use of such information for business reasons, that is no basis for imposing an across-the-board requirement on all companies in an industry.

IV. SMALL AND MEDIUM-SIZED CARRIERS WOULD BE DISPROPORTIONATELY BURDENED IF CUSTOMERS ARE PERMITTED TO FURTHER LIMIT THE USE OF CPNI

Vanguard and other small and medium-sized carriers will be disproportionately harmed if customers are permitted to prohibit the use of CPNI for marketing purposes. Medium-sized and small carriers rely on surgical marketing efforts targeted to specific customer preferences because they are unable to afford regular mass mailings and mass marketing efforts typical of the RBOCs, GTE, Sprint, MCI, and the like. For that reason, Vanguard's marketing efforts (and those of other mid-sized providers) could be crippled if even a small number of its customers chose to prohibit use of CPNI.

Moreover, CPNI is critical in developing new services. A decision by a small number of customers to prohibit use of CPNI also would impair Vanguard's ability to identify trends in

^{11/} See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

customer use to develop and market the most appropriate new services for its customers. Unlike large carriers, Vanguard does not have a customer base that permits it the luxury of adopting an array of services with the confidence that those services will be used by an adequate number of customers to justify the expense. Information that permits the identification of customer trends is critical to Vanguard remaining competitive. Ultimately, without this information, Vanguard and other small and medium-sized carriers may be precluded from developing new services and from effectively competing with large carriers.

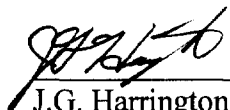
In addition, the costs associated with developing and implementing a process that would screen out customers who elect to exercise the right would burden smaller providers disproportionately. While the total costs of implementing such systems would be similar for all providers, the per customer cost for small and medium-sized carriers will be greater. The Commission should avoid adding an unnecessary burden on small and medium-sized carriers, particularly when the "right" at issue was not provided to customers under the carefully designed statutory scheme.

V. CONCLUSION

Section 222 creates a careful balance between customer convenience, control and competition. Creating a new right for customers to prohibit all marketing uses of CPNI would skew that balance and would be a disservice to consumers. For all these reasons, Vanguard Cellular Systems, Inc. urges the Commission to act in accordance with these comments.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Joslin Arnold, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 30th day of March, 1998, a copy of the foregoing "Comments of Vanguard Cellular Systems, Inc." was sent by hand delivery to the following:

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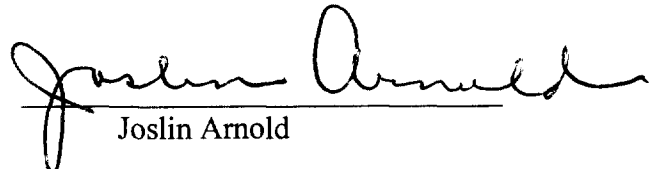
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